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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-442

UNITED STATES DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE, et al.,
Petitioners,
v
ROMEO COMMUNITY SCHOOLS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Department of Health, Education and Welfare has exceeded the authority granted to it by Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, and in particular, by Sections 901 and 902 of that Title, 20 U.S.C. §§ 1681-82, by promulgating as a final regulation Subpart E of 45 C.F.R. § 86 which

purports to regulate the general employment practices affecting all employees of school districts which operate federally-assisted education program.

ARGUMENT

I.

THERE IS NO SUFFICIENT REASON FOR A WRIT OF CERTIORARI TO BE GRANTED IN THE INSTANT MATTER.

In his Petition, the Solicitor General, on behalf of the Petitioner, United States Department of Health, Education and Welfare, et al. (HEW), states that the reason for granting the Petition is as set forth in the Petition for Writ of Certiorari in *Harris* v *Islesboro School Committee, petition for cert. filed*, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-200) (hereinafter *Islesboro*).

The standards governing review on certiorari as set forth in U.S. Supreme Court Rules, Rule 19, demonstrate that there is no sufficient reason for the Supreme Court to give consideration to HEW's Petition in the instant matter. The decisions by the courts of appeal that have decided the issue are not in conflict and the federal district courts that have ruled are similarly in total harmony. In addition, none of the other bases for review set forth in Rule 19(b) have been alleged by HEW.

In essence, HEW grounds its petition for review on the fact that it has been unable to bring to fruition the 507 employment complaints it has received, because the federal judiciary has ruled that it (HEW) is without legal authority to investigate and/or handle claims of

employment discrimination. On page 12 of its Petition in *Harris* v *Islesboro, Supra,* HEW states:

> "Because of the severe disruption in the administrative enforcement of Title IX caused by the decision below and others like it, we submit that review by this Court is warranted now despite the absence of a circuit conflict."

It is respectfully submitted that such a cavalier statement in the face of the overwhelming and unanimous judicial authority is not sufficient to invoke the jurisdiction of the Supreme Court. At least three courts of appeal and nine district courts have ruled against HEW's regulations governing employment, holding that Title IX does not grant HEW jurisdiction or authority to regulate the employment practices of educational institutions.

II.

TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 CONFERS NO AUTHORITY ON THE DEPARTMENT OF HEALTH, EDUCATION AND WELFARE TO REGULATE GENERAL EMPLOYMENT PRACTICES.

A. Title IX Protects Participants, Beneficiaries, and/or Recipients (i.e., Students) and Not Employees.

On June 23, 1972, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, was enacted into law. Section 901, which contains Title IX's basic prohibition against sex discrimination in

federally-assisted education programs, provides, in essence, that no person shall, on the basis of sex:

- be excluded from participation in any education program or activity receiving federal financial assistance;
- be denied the benefits of any education program or activity receiving federal financial assistance; or
- be subjected to discrimination under any education program or activity receiving federal financial assistance.

Section 902 of Title IX vests HEW with the power to enforce Section 901 through two principal means:

- the promulgation of rules and regulations to implement section 901 with respect to programs receiving federal financial assistance; and
- enforcement actions which may result in the termination of federal assistance to recipient institutions that fail to comply with the rules or regulations issued pursuant to that section.

Section 903 provides for judicial review of "any department or agency action" taken pursuant to Section 902.

It is submitted that Section 901 is clear and unambiguous and that the courts below correctly determined that the prohibition contained in Section 901 covers only the participants, beneficiaries, and/or recipients (hereinafter "beneficiaries") of federally-assisted programs, i.e., students, and does not, as

HEW contends, extend to employees. Unless the employee is a direct beneficiary of a federally-assisted program, he/she is not a "person" within the meaning of Section 901. The term "person" set forth at the beginning of Section 901 is specifically modified by and limited to those persons who are beneficiaries of education programs or activities receiving federal funds. Thus, Section 901 clearly limits HEW's jurisdiction to these specific persons, and general employment regulations are beyond the scope of this restricted delegation of authority. In enacting this precise language, Congress did not subject an educational institution's entire employment policies or practices to HEW scrutiny, and did not intend, for example, that unequal pay among male and female lawncutters is to be regulated by HEW with the eventuality of termination of federal funds for federally-assisted educational programs. While a lawncutter is a person, he/she is not a person in a federally-assisted program or activity or a beneficiary thereof.

Therefore, HEW's regulations, to the extent that they are directed to employment, are in excess of the authority given to HEW by Congress and in conflict with the clear and unambiguous provisions of Section 901.

B. The Legislative History Demonstrates That Title IX Does Not Reach Employment Practices.

In its Petition in *Islesboro, supra*, HEW attempts to point to Congressional history as authority for its position. In fact, a review of the entire legislative history demonstrates that Title IX was never intended to cover employment conditions.

Title VI of the Civil Rights Act of 1964[1] prohibits race discrimination in federally-assisted programs. A review of Section 601 of Title VI and Section 901 of Title IX reveals them to be virtually identical. The legislative history indicates that Title IX was, in fact, patterned after Title VI. It is essential, therefore, to review relevant portions of the legislative history of Title VI.

The original version of the bill which became Section 601 of Title VI, contained language prohibiting employment discrimination in connection with federally-assisted programs.[2] An early revision, however, resulted in the deletion of the employment language from Title VI and its subsequent inclusion in an expanded and strengthened new Title VII, the latter title incorporating the provisions of the equal employment opportunity legislation that had been previously reported by the House Committee on Education and Labor.[3]

The modified version of Title VI afforded protection only to the "beneficiaries" of federal programs and did

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[1] 42 U.S.C. § 2000d. Sections 602 and 603 of Title VI are basically identical to Sections 902 and 903 of Title IX; Section 601 is identical with the exception that it prohibits discrimination based on "race, color or national origin" whereas Section 901 prohibits only discrimination based on sex.

The first House version of Title IX provided for a simple amendment to Title VI that would have included the word "sex" after the words "race, color." H.R. 16098, § 805(a), 91st Cong., 1st Sess. (1969). In the version that was finally enacted, the provisions most relevant to this lawsuit, i.e., Sections 901-903, were xeroxed copies of the parallel provisions of Title VI. See Minutes of the House Committee on Education and Labor showing "marked up" xeroxed copy of Title VI, pp. 9-10, September 30, 1971.

[2] H.R. 7152, 88th Cong., 1st Sess. (1963).

[3] H.R. 405, 88th Cong., 1st Sess. (1963); H.R. REP. NO. 570, 88th Cong., 1st Sess. (1963).

not extend to those employed in connection with such programs. All provisions relating to employment were contained in the expanded Title VII, a fact frequently noted in the course of the hearings on the bill.[4] During hearings before the House Rules Committee, for example, Chairman Celler, the House sponsor of the bill, was asked whether Title VI would apply to discrimination against an applicant for employment in connection with a federally-assisted program. His reply was that such discrimination "has nothing to do with Title VI. That would come under FEPC."[5]

That Title VI was intended to protect the beneficiaries of federal programs, and was not intended to cover those employed to provide the benefits under that title, was also the expressed understanding of the Justice Department. In a letter to Senator Cooper, Attorney General Kennedy responded to a specific question on this point:

> 3. *Question*. Would section 602 cover an employer who receives funds under a Federal program, and who discriminates in his employment practices?
>
> *Answer*. Generally no. Title VI is limited in application to instances of discrimination against the beneficiaries of Federal assistance programs, as the language of section 601 clearly indicates.[6]

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[4] See, e.g., *Hearings on S. 1731 and S. 1750 Before the Senate Comm. on the Judiciary*, 88th Cong., 1st Sess. at 327-328, 331, 335 (1963) [hereinafter cited as *Senate Judiciary Committee Hearings*].

[5] *Hearings on H.R. 1752 Before the House Comm. on Rules*, 88th Cong., 2d Sess. at 198 (1964).

[6] 110 CONG. REC. 10076 (1964).

The fact that Title VI would not extend to employment practices, except in those programs which were intended to create employment (i.e., where the employees would themselves be the beneficiaries), was emphasized repeatedly. Title VII, not Title VI, was the vehicle intended to prohibit discriminatory employment practices. During House debate, it was noted that not even a violation of Title VII would have any bearing on payments covered by Title VI.[7]

To avoid any possible confusion as to whether the breadth of Section 601 of Title VI was intended to include employees as well as beneficiaries, a revision which was ultimately enacted included the addition of the following new section:

> [Sec. 604] Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the federal financial assistance is to provide employment.[8]

In discussing this section, Senator Humphrey, the Senate floor leader for the bill, explained that the revisions "made a number of points clearer and more specific. [W]e have expressed in specific legislative language what has always been intended."[9] As noted by the floor leader, Section 604 was intended simply to

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[7] *Id.* at 1602 (remarks of Congressman Mathias).

[8] 42 U.S.C. § 2000d-3 (1970).

[9] 110 CONG. REC. 12707 (1964) (remarks of Senator Humphrey).

reiterate what Section 601 already provided. It was in no way intended to alter the meaning thereof. Thus, the term "no person" which appears in Section 601 of Title VI, the identical term that was used in Section 901 of Title IX, was never intended to encompass persons employed in federally-assisted programs.

As set forth above, the legislative history of Title VI is clear that Congress created Title VII, not Title VI, to deal with racially discriminatory employment practices. The legislation that eventually became Title IX was originally a proposal to amend Title VI by inserting the word "sex" after the words "race, color."[10] When it was determined that a separate title was appropriate, the House Committee on Education and Labor simply xeroxed Title VI and "marked it up" to produce Title IX.[11] Against this background, and as confirmed by the Congressional hearings held in 1971 and 1972, it is clear that Congress intended Section 901 to have the identical scope as Section 601.

Hearings on the provisions that were to become Title IX were held by the House Special Subcommittee on Education.[12] The principal focus of these hearings was the employment discrimination portion of the

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[10] See note 1, *supra*.

[11] Minutes of the House Committee of Education and Labor, 9-10 (Sept. 30, 1971).

[12] *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (1970) (hereinafter cited as *House Title IX Hearings*). H.R. 16098 was re-introduced in the Ninety-Second Congress as H.R. 7248, the House version of what eventually was enacted as the "Education Amendments of 1972." It was subsection 805(a) of H.R. 16098 that would have amended Title VI to include the word "sex"; this subsection later became Section 901 of Title IX.

legislation (Section 906 which amended Title VII and Section 908 which amended the Equal Pay Act[13]), and not the language pertaining to students that became Section 901. Every witness testifying about employment discrimination did so with specific reference to the employment provisions of the bill.[14] Not one witness related the language taken from Section 601 to employment, except, of course, insofar as employment was recognized as a primary purpose of a particular federal assistance program. Those witnesses who discussed the language that was to become Section 901, including the HEW witness, did so in the context of that provision's protection of the student beneficiaries of specific federally-funded education programs.[15]

Other executive branch testimony also indicated a recognition of the difference between the Section 901 protection of beneficiaries of federal programs and the separate provisions relating to employees. Jerris Leonard, Assistant Attorney General, Civil Rights Division, testified that the Justice Department was not able to support the legislation in the form then under consideration, but wished to suggest an alternative, an alternative which would have provided for HEW jurisdiction over employment practices.[16]

Section 2(a) of the administration proposal was virtually identical to Section 901, as amended, and protected the beneficiaries of federal assistance. To

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[13] 29 U.S.C. § 213.

[14] For examples of such testimony, *see* note 12, *supra*, at 8-9, 27, 79, 128, 159, 304-306, 379.

[15] *Id.* at 210-211, 305-306, 379, 750.

[16] *Id.* at 678-690.

provide employees with protection against discrimination, however, the Justice Department proposed to include an additional subsection, [2(b)], which would have prohibited employment discrimination by "recipient[s] of Federal financial assistance."[17] This proposal, *which was not adopted*, did not include the proposed employment amendments under Title VII and the Equal Pay Act, and would, therefore, have conferred *all* Title IX employment jurisdiction on HEW. The specific employment coverage provided in the proposed new subsection 2(b), moreover, was consistent with the 1964 and 1966 executive branch interpretations mentioned above that the "no person" language found in Section 601 of Title VI did *not* include coverage of employees.

The Petitioner in *Islesboro, supra*, at pages 14-18, attempts to utilize an amendment proposed by Senator Bayh, and certain of the Senator's supporting statements, to establish an intent to provide HEW with jurisdiction over employment.

In response to this contention, Respondent would first note that the proposed amendment offered by Senator Bayh included specific employment discrimination prohibitions that were later incorporated into Title VII and the Equal Pay Act. Second, despite HEW's characterization of the Senator's comments as "clear expressions," the summary of the bill that was read into the Congressional Record *after* the Senator's "clear expressions" stated that the bill would include the following categories:

> "Basic prohibition" (dealing with admissions to educational institutions);

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[17] *Id.* at 690-691.

"Enforcement and Related Provisions" (issuance of regulations, compliance efforts, and funding termination by the agencies providing the federal assistance);

"Employment" (Title VII amendment);

"Equal Pay" (Fair Labor Standards Act amendment).[18]

Only the first two categories, above, remained a part of Title IX at the time the bill received final consideration by Congress. The employment aspects were removed from the legislation when Title VII and the Equal Pay Act were amended to bring educational institution employers within the purview of those laws.

Providing remedies for instances of discrimination against beneficiaries of federal programs was the only intent of Congress in its enactment of Title IX. In this regard, if students are discriminatorily excluded from participation in a federally-assisted program, or denied the benefits thereof, and if corrective efforts fail, then the cutoff of funds to that program prevents the federal government from being in the position of aiding the discrimination. As noted by the circuit court below:

> "[I]t is unreasonable to assume that Congress intended for students in a school system to be deprived of the benefits of federal funding as a means of enforcing individual rights of teachers and other school employees. This is particularly true in view of the fact that the same bill included the amendments which gave school

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[18] 118 CONG. REC. 5808 (1972).

> employees direct and superior remedies for sex discrimination provided in Title VII of the 1964 Civil Rights Act. These remedies involve no loss of student benefits."[19]

If an employee believes he/she has been the subject of discrimination, Title VII, not Title IX, provides the appropriate remedies.

C. Interpreting Section 901 as Applying to Employment Is inconsistent with the Programatically Specific Scope of That Section as well as with the Enforcement Provisions of Section 902.

Section 901 prohibits sex discrimination in any "education program or activity receiving Federal financial assistance." The words "program or activity" have the same meaning as they have in virtually every other federal education statute[20] and refer to the specific program or activity that is authorized by and funded under such statutes. For example, under Title I of the Education Amendments of 1978,[21] a local educational agency may use funds received "only for *programs* and projects . . . designed to meet the special educational needs of [educationally-deprived] children."[22] (Emphasis added) The purpose of the Vocational

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[19] Petition 79-442, *Romeo*, Appendix page 8a.

[20] Consistent congressional usage of the same terms in the same context creates a presumption that their intended meaning is the same. *See* Sutherland, *Statutes and Statutory Construction*, § 47.28.

[21] 20 U.S.C. § 2701, *et seq*.

[22] 20 U.S.C. § 2734.

Education Act of 1963[23] is to extend federal aid to ". . . improve, and where necessary, maintain existing *programs* of vocational education," . . . "to develop new *programs* of vocational education." (Emphasis added) Thus, Title IX, like Title VI,[24] prohibits discrimination in any program or activity authorized by and funded under statutes such as Title I, the Vocational Education Act, and so forth. It has no application to education programs and activities that do *not* receive federal assistance.

The legislative history of Title IX is also clear that Section 901 is program-specific. The original version of Title IX introduced in the Senate by Senator Bayh was an institutional approach; i.e., if a school district receives any federal funding, all of its activities are covered:

> "No person in the United States shall, on the ground of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity *conducted by* a public institution . . . which is a recipient of federal financial assistance for any education program or activity, ... (Emphasis added)[25]

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[23] 20 U.S.C. § 2301 (1) and (2).

[24] Title VI, on which Title IX is modeled, was considered an alternative to separate amendments to each individual grant statute to prohibit discrimination in the programs and activities authorized by each such individual statute. See, e.g., *Senate Judiciary Committee Hearings* at 396-397 (colloquy between Senator Ervin and Attorney General Kennedy concerning the list of laws "amended by section 601"); 110 CONG. REC. 1613 (1964) (remarks of Congressman Meader concerning practical difficulties of drafting separate legislative language for each federal assistance program).

[25] 117 CONG. REC. 30156 (1971).

Similarly, the administration's revised proposal, which expressly sought to give HEW employment jurisdiction, would also have covered every program operated by recipient school districts. It was not limited to "programs receiving" federal aid.[26] By prohibiting sex discrimination in every program or activity conducted by recipients of federal aid, these alternative versions would, indeed, have expanded the scope of Section 901 beyond the particular federally-assisted programs. *However, the provision that was enacted* as Section 901 authorized federal jurisdiction only over those *programs* which are "receiving federal financial assistance" and not over every activity conducted by institutions which receive federal aid.[27]

In causing Section 901 to be enacted in identical form to Section 601 of Title VI, which both in language and purpose is limited to federally-funded programs, and rejecting the proposals of Senator Bayh and the administration that would have covered *all* programs operated by recipients of federal assistance, Congress clearly and consciously restricted Section 901 to federally-funded programs.

As stated by the circuit court below:

> ". . . The concern of this particular statute is not with all discrimination against persons in any

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[26] H.R. 5191, 92d Cong., 1st Sess., § 1001(a) (1971). Unlike H.R. 5191, the earlier administration bill, proposed during the Title IX hearings, was programatically specific in the Section 901 portion which protected students. Both administration versions contained additional identical language expressly covering employment and conferring enforcement authority on HEW.

[27] Witnesses testifying during the Title IX hearings also understood the term "program or activity" as used in Section 901 to refer to programs funded under specific grant statutes. See, e.g., *House Title IX Hearings* at 645-661 (testimony of Dr. Peter Muirhead on behalf of HEW).

> way connected with educational institutions which receive federal funding. Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex 'under any education program or activity receiving federal financial assistance . . .' Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by § 1681."[28]

D. Section 902: The "Pinpoint Termination" Provision Confirms the Programatically Specific Scope of Section 901.

Section 902, which is the basic enforcement mechanism of Section 901, authorizes each federal agency:

> . . . which is empowered to extend federal financial assistance to any education program or activity . . . to effectuate the provisions of [901] of this title *with respect to such program or activity* by issuing . . . regulations . . . which shall be consistent with the achievement of the objectives of the statute authorizing the financial assistance. (Emphasis added)[29]

The regulatory power of HEW is thus limited to "such program or activity" and, as such, is coextensive with

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[28] Petition 79-442, *Romeo*, Appendix pages 6a-7a.

[29] 20 U.S.C. § 1682.

Section 901's coverage of student-beneficiaries in federally-funded programs.

HEW is further authorized to effect compliance with any regulation adopted pursuant to Section 902 by the termination of federal financial assistance "under such program." However, the termination must be limited to "the particular program, or part thereof, in which such non-compliance has been found."[30] In enacting this "pinpoint" provision, Congress made a conscious decision to limit enforcement action to the particular federally-funded educational program or activity in which discrimination is determined to exist. Thus, for example, Title I funds can only be terminated upon a finding of discrimination in the Title I program. A category of assistance can not be eliminated because of discrimination in some other program. Case law has confirmed that this is the remedy under the counterpart legislation, Section 602 of Title VI. *Board of Public Instruction of Taylor County, Florida* v *Finch*, 414 F2d 1068, 1078 (5th Cir. 1969); *Gatreaux* v *Romney*, 457 F2d 124, 128 (7th Cir. 1972); *Mayor and City Council of Baltimore* v *Matthews*, 562 F2d 914, 924 (4th Cir. 1977). Since HEW's remedy under Section 902 must be "pinpointed" to the program or activity receiving federal assistance, it is totally inconsistent to assume that Congress, in Section 901, intended to cover *all* of a school district's employees.

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[30] *Id.*

E. HEW's Employment Regulations Are Inherently Non-Program Specific and Overbroad: HEW's So-Called Infection Theory Is Invalid.

HEW has argued that it has authority to regulate employment practices because sex discrimination in employment may "infect" a school district's operations to such an extent that discrimination against students results. This argument, however, is a "boot-strap" argument, without merit, because the employment regulations fail to mention any impact on the children. Moreover, the cursory investigation conducted by HEW against Romeo failed to make even the slightest inquiry into this area. This is also true in the *Islesboro* case and the *Harris* v *Junior College District of St. Louis* case, *petition for cert. filed*, 48 U.S.L.W. 3118 (U.S. Aug. 6, 1979) (No. 79-201)). Therefore, the "infection theory" has no relevance to the issues presented in the three cases.

CONCLUSION

For the reasons set forth above, there is no basis for this Court to grant the Writs of Certiorari sought by HEW in the *Islesboro, Junior College District of St. Louis,* and *Romeo* cases. The courts are the final authorities on issues of statutory construction and are not merely rubber-stamps for bureaucratic regulations. The unanimity of the courts' decisions clearly demonstrates the lack of ambiguity of the statute and the single-minded rejection of HEW's warped construction/interpretation in its attempt to govern employment through regulations. As such, it is

submitted that the "no person" language of Section 901 protects only the student beneficiaries of federally-assisted education programs, and does not provide general coverage to employees or employment relations. The authority to regulate school districts' general employment practices, which HEW claims to possess, was expressly requested by the executive branch and expressly denied by Congress. By transparent interpretative legerdemain, HEW has attempted to ignore the will of Congress and usurp that body's legislative functions. HEW's bureaucratic lawmaking not only violates the principle of separation of powers, but also undermines fundamental principles of federalism which governed the careful efforts of the Congress.

With respect to discrimination against employees in educational agencies, Congress provided the full panoply of procedures, remedies and safeguards available under Title VII and the Equal Pay Act. With respect to discrimination against students in federally-assisted programs, Congress was careful to pinpoint the enforcement authority so that only the particular program in which discrimination occurs would be affected by a fund cutoff. Congress prohibited intereference with the receipt of federal dollars which are in fact being used in a nondiscriminatory manner to achieve the desirable educational goals intended. HEW's arrogation of the authority to regulate "the entire operation" of local school districts is totally disruptive of the carefully planned statutory structure provided by Congress.

For the reasons hereinbefore set forth, it is submitted that the findings and reasoning of the district court and the Sixth Circuit Court of Appeals are correct. Romeo School District, therefore, respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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